



Missouri Department of Natural Resources

MISSOURI CLEAN WATER COMMISSION MEETING

June 26, 2002

Holiday Inn Select Executive Center, Columbia, Missouri

MINUTES

Present

Thomas A. Herrmann, Chairman, Missouri Clean Water Commission
Davis D. Minton, Vice-Chairman, Missouri Clean Water Commission
Janice Schnake Greene, Commissioner, Missouri Clean Water Commission
Cosette D. Kelly, Commissioner, Missouri Clean Water Commission

Darrell Barber, Department of Natural Resources, Jefferson City, Missouri
Dorris Bender, City of Independence, Independence, Missouri
Michael Bollinger, Ameren, St. Louis, Missouri
Tom Broderick, Plattsburg, Missouri
Robert Brundage, MO-AG, Princeton, Missouri
Chris Buechle, MO Cattlemen's Association, Columbia, Missouri
Dick Champion, City of Independence, Independence, Missouri
Randy Clarkson, Department of Natural Resources, Jefferson City, Missouri
Ann Crawford, Department of Natural Resources, Jefferson City, Missouri
Cindy DiStefano, Department of Conservation, Columbia, Missouri
Dave Drennan, MO Dairy Association, Chesterfield, Missouri
Tim Duggan, Assistant Attorney General, Jefferson City, Missouri
Jack Dutra, JD Information Services, Inc., Overland Park, Kansas
Scott Dye, Sierra Club, Columbia, Missouri
John Ford, Department of Natural Resources, Jefferson City, Missouri
Bob Hentges, Missouri Public Utility Alliance, Jefferson City, Missouri
Leslie Holloway, MO Farm Bureau, Jefferson City, Missouri
John Howland, Midwest Environmental, Jefferson City, Missouri
Jim Hull, Director of Staff, Missouri Clean Water Commission
Sallie Keeney, REGFORM, Jefferson City, Missouri
Richard J. Laux, Department of Natural Resources, Jefferson City, Missouri
Joseph Leahy, Smith & Company, Poplar Bluff, Missouri
Bruce Litzsinger, Metropolitan St. Louis Sewer District, St. Louis, Missouri
Doug Mertens, Mid-Missouri Limestone, Inc., Fulton, Missouri
Ken Midkiff, Sierra Club, Columbia, Missouri
Kevin Mohammadi, Department of Natural Resources, Jefferson City, Missouri
Daniel Molloy, Smith & Company, Poplar Bluff, Missouri
Deborah Neff, Assistant Attorney General, Jefferson City, Missouri
Don Nikodim, MO Pork Producers Association, Columbia, Missouri

Don S. O'Connor, III, Clinton County SWCD, Plattsburg, Missouri
Kevin Perry, REGFORM, Jefferson City, Missouri
David Potthast, Department of Natural Resources, Jefferson City, Missouri
John Pozzo, AMEREN, St. Louis, Missouri
Joy Reven, Department of Natural Resources, Jefferson City, Missouri
Becky Shannon, Department of Natural Resources, Jefferson City, Missouri
David Shorr, Lathrop & Gage, Jefferson City, Missouri
Shawn Singer, Department of Natural Resources, Jefferson City, Missouri
Terry Spence, Unionville, Missouri
Alex Stemme, MO Soybean Association, Jefferson City, Missouri
Melody Torrey, Unionville, Missouri
Steve Townley, Department of Natural Resources, Jefferson City, Missouri
Richard Tuttle, City of Fulton, Columbia, Missouri
Diane Waidelich, Secretary, Missouri Clean Water Commission
Robert Williamson, Kansas City Water Services, Kansas City, Missouri

Chairman Herrmann called the meeting to order at approximately 9:05 a.m. and introduced Vice-Chairman Minton, Commissioners Kelly, and Greene; Deborah Neff, Assistant Attorney General; Jim Hull, Staff Director and Diane Waidelich, Secretary.

Commissioners Hegi and Perry were absent from the meeting.

ADMINISTRATIVE MATTERS

State Revolving Fund Update

Mr. Hull, staff director, reported \$19 million is slated to be taken out of the State Revolving Fund to make an interest payment on water pollution control bonds and there has been much discussion regarding the ramifications of this action. The Governor will sign the budget containing this provision at 10:00 a.m. today. Mr. Hull read from a letter to the Missouri Water Environment Association from department director Steve Mahfood. This letter stated that all involved parties have been advised of the consequences of affecting this transfer and that director Mahfood is confident there will be a plan of action that will not result in the loss of the state's capitalization grants. Mr. Hull noted the department appreciates the efforts of those who have expressed their concerns about this issue. This action does allow for a balanced budget but there are ramifications of using these funds.

Greenfield Intended Use Plan Project Cost Adjustment

Steve Townley, chief of the Water Pollution Control Program Financial Services Section, reported on the request by staff for a project cost adjustment to the 2003 Intended Use Plan (IUP) for the community of Greenfield. Staff did not update the 2003 IUP to reflect the community's revised application that was received prior to the November 15, 2002 deadline. The 2003 IUP indicates that \$1,165,000 has been set aside for the community but should have identified \$1.3 million for the community. Mr. Townley noted the revised project cost

mirrors their voter-authorized indebtedness. He continued that there are no uncommitted funds in the leveraged loan program. Mr. Townley recommended that the increase be awarded based on staff's assurance that \$135,000 will be made available when projects are bypassed at the September commission meeting. He noted this was an error on the part of staff and he sees no reason to impede the community's progress because of this error.

Darrell Barber, project coordinator, stated the community is out to bid on the project and would like to do an interim direct loan in July or early August.

Commissioner Greene moved **to accept the staff recommendation to increase Greenfield's loan amount to \$1,300,000**; seconded by Commissioner Kelly and unanimously passed.

East Prairie Intended Use Plan Project Cost Adjustment

Mr. Townley stated the City of East Prairie is seeking a small increase and project cost adjustment relating to the 2003 Intended Use Plan (IUP). Their request would increase the IUP amount from \$246,850 to \$315,000, an increase of \$68,150. Mr. Townley noted this request exceeds the ten percent threshold which staff can approve. Currently sufficient funds are not available in the uncommitted SRF reserve fund to honor this request. Mr. Townley stated staff anticipates balancing this account with recoveries in September. Staff is currently reviewing plans and specifications and the project is moving toward participating in the fall closing. Mr. Townley recommended approval of the increase.

Commissioner Greene moved **to accept the staff recommendation to increase East Prairie's loan amount to \$315,000**; seconded by Commissioner Minton and unanimously passed.

Theodosia Update

Randy Clarkson, chief of the Water Pollution Control Program Engineering Section, reported there was extensive discussion about Theodosia's request for a grant increase at the May commission meeting. The increase was not granted and staff was directed to look into cost cutting measures after which staff met with the consultant to review various options. Mr. Clarkson stated this is a unique design specifically for Theodosia made up of gravity sewers to lift stations that incorporate solids removal. He continued that another option that could have possibly worked was to use septic tanks and pumps at each home. The city investigated this option and received negative feedback from a neighboring community with that type of system. Mr. Clarkson noted using smaller gravity sewers with the selected option could have worked. Unfortunately, a cost savings could not be realized at this time because of increasing pipe costs since the project was bid. A deductive alternate to serve 13 or 14 homes was not awarded and this allowed the project to proceed without the increase. Mr. Clarkson noted there is now a very small contingency but the consulting firm has a good record of bringing projects in within budget and staff is confident the project can be completed within budget.

Chairman Herrmann noted the contingency fee was \$121,464, almost the amount of the requested increase. Since the excavation was unclassified, he did not see the reason for that amount of contingency.

Mr. Clarkson noted that has been reduced.

Chairman Herrmann asked if the project is down to the original authorized amount.

Mr. Clarkson responded it is due to a group of homes on the west side of town being eliminated from the project. The city will try to provide sewer service to that area at some point in the future if it can't be accomplished during this project.

Chairman Herrmann noted the per person cost before the increase request was over \$16,000 which seems awfully high.

Mr. Clarkson stated he does not disagree but this is a well-designed system. He pointed out that if the commission wants to address project cost per home, this needs to be done through the regulatory process rather than when a project has been in process for years. Mr. Clarkson stated it costs to provide wastewater service and when communities grow with no thought to how development occurs, it costs to do it right. He noted the least cost option would have not been close to the quality of the option that was selected. Mr. Clarkson said whether or not the commission wants to participate in projects that are this expensive per home needs to be discussed.

Chairman Herrmann stated that should have been the question during the review of the facility plan. The engineer is required by regulation to investigate all possible alternatives to maintain a reasonable cost and still have a quality project.

Mr. Clarkson responded he believes they did in this case and he fully supports the chosen option. He noted that possibly ten percent could have been saved and a system put in that costs more to operate, and much more to expand if growth occurs. Mr. Clarkson stated he does not believe redesign of the system would have saved a substantial amount of money. There is no cost limit per home in the existing rules and staff applies the existing rules.

Chairman Herrmann responded he agrees with this and does not want to imply that a maximum cost could be applied for every project, but in this case it seemed excessive considering the location of Theodosia. There are alternative methods that could have saved money.

Request for Extension of Williamsville Variance

Ann Crawford, project coordinator for the Water Pollution Control Program Financial Services Section, reported the commission approved a variance to the City of Williamsville to extend the date to have their project bid. This project appeared on the FY 2000 Forty Percent State Fundable List and bids have to be completed within two years. During the

preconstruction conference staff discovered that only one phase of the project had been bid and the grant amount would be based on that one phase. The city then requested a variance which was approved. Phases II and III have not been completed during this extension. Joseph Leahy, Smith and Company, noted Phase II has been completed and Phase III is out for bid. Construction start will be around August 5 leaving only 30 days to meet the September 19 timeline. Mr. Leahy continued that it is believed that 30 days is not adequate to address the needed repairs. He requested a three-month extension to the variance which would allow 90 days for construction.

Chairman Herrmann asked about the status of the city's lagoon.

Daniel Molloy, Smith and Company, responded the city is presently concentrating on completing this project. The city will address the lagoon next but an additional source of funds is needed. Mr. Molloy reported the Phase II TV work was very successful in identifying many sources of infiltration.

Commissioner Minton moved **to grant the extension to December 19, 2002 to the City of Williamsville's variance**; seconded by Commissioner Greene and unanimously passed.

Final Staff Recommendation on Seymour Variance Request

Ms. Crawford reported the City of Seymour requested a variance to 10 CSR 20-4.021 to meet requirements for the EPA money they are receiving regarding the phosphorus removal project. Ms. Crawford stated preliminary approval of the variance request was given at the May commission meeting and requested final approval of this variance request.

Commissioner Kelly moved to **accept the staff recommendation to grant final approval to the City of Seymour's variance request**; seconded by Commissioner Greene and unanimously passed.

Staff Recommendation on City of Doniphan Variance Request

Richard Laux, Water Pollution Control Program Permits Section, reported the City of Doniphan filed a variance request on April 2, 2002 requesting a waiver of the fee for the construction permit. The city's request stated that the requirement for disinfection places the city in a position where they are unable to cover the costs under a grant. They also stated that they had proposed a discharge treatment complex when the grant for their existing system was received 15 years ago. The city was informed at that time that such a system would not be funded under the grant system and disinfection was not installed at that time. Installing disinfection now would cost over \$50,000 compared to an initial estimate of about \$5,000. The city also objected to the disinfection requirement since discharges have shown continual compliance with the fecal coliform effluent limitations in their permit. Mr. Laux noted this monitoring is not at the pipe but at a downstream location for the typical effluent limits of 400 rather than the in-stream limits of 200. He continued that the limitations in their permit have been met.

The original permit expired on August 30, 1999. A draft permit for renewal was posted for public review and comment in November, 1999. The draft permit included a compliance schedule to require the installation of effluent disinfection. The permit was issued in February 2000. Mr. Laux reported the city had commented regarding the need for disinfection and a response was sent in December 2000. Because of a delay in issuance of the permit, there was a problem with the compliance schedule. A proposed permit modification was public noticed on March 16, 2001 which included a revised compliance schedule allowing until April 1, 2002 for completion of construction of a disinfection system. A revised permit was issued on June 1, 2001 and was not appealed. A construction permit is required to complete construction. An application for a construction permit was received on March 21, 2002 but no fee was included with the submittal.

Mr. Laux stated the permit requires the installation of disinfection. Modifications to a treatment system require a construction permit. Payment of an application fee of \$750 for construction permits on systems discharging less than 500,000 gallons per day is required by Statute and the City of Doniphan's design flow is 456,000 gallons per day. The statute does not provide authority to the department for waiving construction fees under these circumstances and the department routinely requires payment from any applicant to obtain a construction permit. Mr. Laux recommended the commission deny the variance request and require payment of the permit fee.

Commissioner Minton moved to **accept the staff recommendation to deny the City of Doniphan's variance request**; seconded by Commissioner Greene and unanimously passed.

Staff Recommendation on Rose Acre Farms Variance Request

Mr. Clarkson reported this request would have provided the relief requested by the applicant if staff could have presented the request at a previous commission meeting. The request was for an extension to allow the Missouri Department of Transportation (MoDOT) to move rock that has been blasted out of a hillside so that a building can be constructed. The highway project does not match the schedule Rose Acre Farms is under. The construction permit will expire December 31, 2002 and Clean Water Commission rule 10 CSR 20-6.010 prohibits a second extension of a construction permit. Providing preliminary approval now and public noticing for 30 days does not allow for approval until August which does not fit the schedule.

Mr. Clarkson stated the staff recommendation provided to the commission was to deny the variance request. Rather than denying the request, he recommended tabling the request while staff continues to work on resolution of this problem.

Commissioner Greene asked if Rose Acre Farms was originally going to remove this rock themselves and now wants to wait until MoDOT can use it.

Mr. Clarkson responded that Rose Acre Farms has moved the portion that MoDOT does not need and MoDOT wants to make use of the remainder.

David Shorr, representing Rose Acre Farms, thanked the staff for getting this issue to a point where it can move forward. He stated the project could be completed by the required date but MoDOT will save a significant amount by moving rock from the Rose Acre location versus having to acquire it from other quarries. Mr. Shorr reported the first building under the construction permit has been built but construction of the second building has ceased because of the request from MoDOT. He commented this is a winning situation for both parties. The extension request would give Rose Acre Farms until July 1, 2003 to complete the second building under the construction permit. Mr. Shorr requested that preliminary approval be given of the variance request as a statement of support of an extension for this purpose.

Mr. Shorr stated there is also a permit appeal pending where a permit did not get issued because of external pressures that involved other permits. He stated this undermined the entire process and noted there is now less confidence that issues will be taken care of. Mr. Shorr requested preliminary approval which would assure Rose Acre Farms continued negotiations with the department is in order.

Commissioner Greene asked if the first extension involves the appeal.

Mr. Clarkson responded it was not related to the operating permit appeal.

Chairman Herrmann asked if there is any legal problem with preliminarily approving the variance request.

Deborah Neff, Commission Counsel, stated the only adverse thing that could happen is if there was any sort of enforcement action which won't happen because staff is recommending the variance.

Mr. Clarkson noted this is not a noncompliance issue but rather a scheduling problem.

Mr. Shorr stated this is a scheduling issue and if a violation were to occur, it would not occur until December 31, 2002. He continued that he has drafted a settlement agreement, which may take care of the matter prior to August.

Commissioner Minton moved to **grant preliminary approval and to public notice the variance request from Rose Acre Farms and to encourage the department to continue working toward resolution**; seconded by Commissioner Greene and unanimously passed.

Adoption of May 1, 2002 Commission Meeting Minutes

Commissioner Minton moved to **approve the minutes of the May 1, 2002 meeting as submitted by staff**; seconded by Commissioner Greene and unanimously passed.

Commission Directive on Enforcement Referrals

Mr. Hull reported the department has formalized procedures by which certain types of referrals could be transmitted from the department director to the Attorney General's Office in response to the commission's request. The procedure lays out that referrals directly from the department director will occur only when there is a potential for environmental harm, or where a criminal investigation is being conducted and damage to the case would occur if details were discussed in an open commission meeting, or referral is being sought so violations may be addressed jointly with another referral from within the department. Mr. Hull noted this does not occur on a routine basis. He asked for commission concurrence of this procedure.

Commissioner Minton asked what happens if a matter is directly referred and the commission disagrees with the action.

Mr. Mohammadi stated the commission will receive a summary of these actions. If there are any concerns the matter can be discussed.

Commissioner Greene moved to **approve the process for referrals to the Attorney General's Office through the department director** as outlined in the June 7, 2002 memorandum from Jim Hull; seconded by Commissioner Kelly and unanimously passed.

Briefing on 303(d) List

John Ford, Water Pollution Control Program Planning Section, reported the 303(d) List is a requirement of Section 303(d) of the federal Clean Water Act, which requires all the states to provide a list of certain impaired waters to EPA every two years. As a result of considerable public interest over the last six years, states have provided a fairly significant public participation process during development of the list. Mr. Ford stated the public participation process for the current list began about 16 months ago. Staff plans to bring the list back to the commission for approval in August prior to providing to EPA in September.

Commissioner Minton noted habitat loss is now listed as opposed to sediment load, whole body contact is an issue he would like information on, and asked if changes to the list were made by staff or if EPA directed the changes that have been made.

Mr. Ford replied many changes were made to improve the list technically. The 1998 list contained a lot of listings for sediment. While planning for the next list staff noted sedimentation is part of the problem but there are other things causing habitat degradation. The listing was then changed to habitat impairment. Mr. Ford explained other changes come about more broadly because of changing EPA guidance. Because there has been so much interest, and potentially so much economic impact from what does or does not go on the 303(d) List, EPA has been receiving a lot of pressure and has come out with several changes in their guidance based upon public participation panels that have worked with EPA. Mr. Ford noted EPA provided a whole new set of guidelines on how to develop the list when the

public participation process was more than half completed. Initially staff thought to follow those guidelines but reconsidered and decided to stay with the guidelines used when this present revision was initiated.

Commissioner Minton asked if it wouldn't be prudent to go through the rulemaking process before submitting the next list since a law has been passed that the 303(d) List will have to be developed through the rulemaking process. He noted this would develop a more concise list. Commissioner Minton stated EPA made changes to the last list the commission submitted and the economic benefits of being on that list are significant. He asked if not promulgating a rule at this time would be doing a disservice to the citizens of the state. Even though there has been a lot of public input in developing the list, it does not go through as much scrutiny as a rulemaking does. Commissioner Minton asked what the ramifications are of doing a rulemaking before submitting the list.

Mr. Ford replied staff is required to submit a list to EPA in September. If the list is not submitted, they will construct their own list.

Commissioner Minton noted they did this after all the work that was done on the 1998 list and added the contingency list of waters to the list.

Mr. Ford noted EPA's intent of what needed to be done on those waters and staff's were different.

Commissioner Minton stated the list that is being worked with now was actually developed by EPA.

Mr. Ford noted they are the ultimate authority for the Federal Clean Water Law.

Commissioner Minton asked what the worst case scenario is if Missouri does not submit the list by the deadline.

Mr. Ford responded they could develop their own list and Missouri may get something they won't be happy with.

Commissioner Minton noted we were not happy with the last list. The 303(d) List is now about money and politics and protecting the resource. He commented he is terribly afraid millions of tax payer dollars will be spent on a stream that might not have been on the 303(d) List had there been enough information available to make a decision. Commissioner Minton noted he has a real problem with a process that allows the expenditure of millions of dollars without justification.

Mr. Ford noted that most of the Category B list streams were the habitat impaired waters and still appear on the list.

Commissioner Minton asked if the empirical data is now available to prove that these streams should be on the list as a result of habitat loss.

Mr. Ford replied most of these streams were scheduled for biological evaluation somewhere in the 5 to 15 year timeframe after they were added to the list. In the last year, the first of those streams have undergone biological monitoring. Most of them have not yet been monitored.

Commissioner Minton reiterated there is the potential to spend millions of dollars on a stream that is on the 303(d) List where data that says it needs to be cleaned up is not available.

Mr. Ford stated the streams being discussed were actually chosen from around 1,200 stream segments representing most of the prairie streams in northern and central Missouri. For those streams there is good biological evidence of impairment based upon distributional studies of fishes and changes in fish populations over time. Mr. Ford noted there is good evidence on a regional scale to indicate that impairment exists but not on all of the individual streams. The monitoring planned over the next ten years for most of these 40 streams would be to further evaluate the impairment.

Commissioner Minton noted promulgating the list by rule will define habitat loss and the list will be developed with input of all Missourians who choose to participate. He suggested doing it right this time by doing what we have been directed to do realizing that we will be submitting the list late. Commissioner Minton stated this is about point and nonpoint source pollution and money being spent to correct problems within these streams. Those with receiving streams on the 303(d) List are at a huge economic and point system advantage of getting funds from the federal government. Commissioner Minton asked if they should have that economic advantage when there is a possibility that they should not have been on the list to begin with. He pointed out it's grossly unfair and does not protect the resource to its best advantage and has the potential to waste a lot of money. He noted the threat of EPA developing its own list is of no concern.

Doug Mertens, Mid-Missouri Limestone, Inc., noted he concurs with Commissioner Minton's statements and encouraged notification of landowners involved with this issue during the public notice process. Concerns mentioned by Mr. Mertens were that there is no empirical data available to prove that a stream should be listed and the need for being proactive by notifying those of corrective actions needed so these can be accomplished prior to being listed.

Dick Champion, City of Independence and the Association of Metropolitan Sewerage Agencies (AMSA), reported the Little Blue River is on the 303(d) List for mercury because of an air pollution source. He provided copies of a preliminary study from AMSA showing domestic evaluations. Mr. Champion stated AMSA would like to continue to be part of the process and acquire some data. He asked that the mercury waterbodies be taken off the list, but if they cannot, Mr. Champion recommended including them on the 305(b) Report. He noted that the publicly owned treatment works cannot take care of mercury issues when they

come from an air source. Mr. Champion asked that a stakeholder group be brought together to deal with good science on a national level.

John Pozzo, Environmental Safety and Health Department of Ameren Corporation, stated that Ameren UE owns and operates Bagnell Dam and the Osage Hydroelectric Plant located on the Osage River. The Osage plant is licensed by the Federal Energy Regulatory Commission. Ameren UE is currently working to relicense the project using the alternative licensing procedure designed to expedite the relicensing process by improving communications between all stakeholders. In relation to this relicensing, data from the first year of a comprehensive water chemistry study on the lower Osage River below Bagnell Dam were used by DNR to classify a segment of the river as impaired. The new addition to the proposed final 303(d) List specifies 10 miles of the Osage River citing low dissolved oxygen as the pollutant and Bagnell Dam as the source. Mr. Pozzo continued that it is acknowledged that the current 5 ppm water quality standard for dissolved oxygen is not met for some distance downstream of the dam for a period of time in the summer. He offered these comments for the commission's consideration.

The distinction between pollutants and pollution has been the subject of much discussion since being included in the 1987 revision to the Clean Water Act. Bagnell Dam does not add pollutants to the river. The creation of the Lake of the Ozarks results in seasonal thermal stratification and natural biological decomposition at depth, which seasonally results in low dissolved oxygen (DO) conditions. Since the dam's turbine intakes are located deep within the lake, the water released throughout mid to late summer has very low DO. Courts have repeatedly found that such releases from dams are not subject to regulation as a discharge of pollutants. Since the current statutory and regulatory focus of the TMDL process is directed at the allocation of waste loads associated with specific pollutants, the TMDL process is not suited to circumstances like ours in which pollutants do not cause the impairment, and pollution created by lake stratification and biological decomposition cannot be allocated.

EPA recognized the distinction between pollutants and pollution and provided an approach to address this dilemma in TMDL guidance documents issued to states. DNR generally incorporated EPA's recommendations into their March 2001 Methodology for Development of the 2002 Section 303(d) List by creating discrete categories for each listing. One such category would distinguish waters for which no discrete pollutant is identified as the cause of the impairment. DNR chose not to follow their own methodology and thus the Final Proposed List does not include such classifications. This contradicts recent EPA guidance, in that the Office of Water's 2002 Integrated Water Quality Monitoring and Assessment Report Guidance memorandum of November 19, 2001 recommends the use of unique assessment categories. EPA's guidance document acknowledges the appropriateness of a category of water that may be impaired or threatened for one or more designated uses, but does not require the development of a TMDL because the impairment is not caused by a pollutant.

Four other water segments below dams and reservoirs have previously been included in Missouri's 303(d) List: waters downstream from Cannon, Montrose, Table Rock and Truman Dams. Ameren does not believe DNR has yet begun to address these waters, and

clearly there is no work underway to develop TMDLs for them. DNR staff have stated that a future anticipated change in the TMDL regulations will provide additional flexibility and suggests that facilities such as the Osage Plant merely accept the listing as an interim situation to be revised and corrected in subsequent revisions to the 303(d) List. However, we question the appropriateness of placing waters on the list without proper categorization to indicate that the TMDL development process does not lend itself to non-pollutant impairments.

Mr. Pozzo offered the following two alternatives for DNR's consideration: DNR has the discretion to defer listing of the Osage River beyond those changes proposed in earlier drafts, and instead make more substantive changes in a subsequent list update following the expected changes in federal rules and guidance. Secondly, DNR should issue the 2002 list with appropriate subcategories to acknowledge impairments for which TMDLs may be inappropriate. Ameren believes the incorporation of these considerations would provide for environmental regulatory action that more appropriately and accurately reflects the TMDL process.

Kevin Perry, REGFORM, stated is he very concerned that the list before the commission today does not comply with the department's Methodology for Development of the 2002 303(d) List. He noted page 14 of the methodology says the list should be partitioned into four parts which is significant because of those waters for which no specific discrete pollutant is listed for the cause of impairment. He asked that the commission work with the department to see that the list contains the categories proposed in the department's methodology. Mr. Perry continued that the guidance provided by the USEPA not only provided categories that would allow distinction between pollutant and pollution, it also provided a way to make sense out of how much and what type of information is available. He stated during a meeting in January, the department was very supportive of this categorization system that EPA's guidance contained, but it now appears DNR headed in the opposite direction immediately before the list was public noticed. Mr. Perry stated public discussions indicated that a categorization of the streams was being circulated within the department. He continued that he has asked that this list be made available so that others can review it and asked that the commission encourage staff to make it available to the commission and the public. Mr. Perry noted there is an opportunity now to do what is convenient but there is also an opportunity to do what is right for the state. He asked that the intent of the legislation to have this list promulgated as regulation be carefully considered.

Richard Tuttle, City of Fulton, reported the current 303(d) List has Stinson Creek listed although the size of the impairment has been reduced from one-half to one-tenth of a mile. Mr. Tuttle informed the commission that the City of Fulton continues to support removal of Stinson Creek since this could be very costly to the city.

David Shorr stated he is commenting as a resident of the City of Columbia. He noted the designation should not be subjective but rather based on facts, which are based on cognitive, scientific data. Hinkson Creek is designated as impaired with the pollutant designated as unspecified directly contrary to the intention of the law and the efforts to improve water

quality in the community. Mr. Shorr stated this clearly indicates a fishing expedition on the part of the government to list and then find a problem rather than have a problem and then list. He continued that the characterization of the source is urban nonpoint source. No other stream in the state has been listed by a pollutant called unspecified. Mr. Shorr noted the local government should be concerned about spending numerous tax dollars trying to cure unknown defects but it appears the listing was not challenged by Columbia or Boone County. He stated as a citizen of this community he is offended that this watercourse is listed in a federal document without any definitive, cogent or representative information. Mr. Shorr stated he is amazed that unspecified pollutant is caused by urban runoff when anyone who looks at Hinkson Creek after a rainstorm knows that the bulk of the runoff is due to the rural related loss of soil and erosion control. He noted his comments are not meant to say that Hinkson Creek is a clean, pristine stream nor does not require listing or is free from impairment. Mr. Shorr continued that he believes it is the local and state government's obligation to demand cognitive data to justify scenarios that would increase regulatory burden upon any given community. The local government's acquiescence to this major regulatory initiative with such flimsy data can only lead to the conclusion that there is political will to accept excessive regulatory burden without regard to facts. Mr. Shorr asked that Hinkson Creek be removed from the 303(d) List until proper and adequate designation requirements are met, the department be ordered to list by specific pollutant and properly follow Chapter 536 for a decision which will result in tax dollars being spent so a forum is available as properly intended by law.

Ken Midkiff, Sierra Club, stated section 303(d) of the Clean Water Act directs the USEPA to promulgate a list for each state and region. Recommendations of the state are followed but EPA has the ultimate authority to promulgate the 303(d) List. Mr. Midkiff continued that the list is for those waters that are not meeting water quality standards. The second phase is to do total maximum daily loads. Mr. Midkiff noted the Osage River is impaired by low dissolved oxygen and various water bodies are impaired by mercury. He stated it may be difficult for anyone in the US to do anything about mercury deposition but those waterbodies are impaired by mercury and must be listed.

Mr. Midkiff stated public participation is appropriate and the Sierra Club would rather have a good quality list than one that is done quickly. He continued this philosophy should also be applied to the permit efficiencies system wherein a good permit is developed rather than a permit being rushed through.

Mr. Midkiff stated the waters listed are appropriate and there is science to back the listings; however, there are concerns about why some of the streams are listed. He stated the Sierra Club is certain that habitat impairment is not a pollutant; it is a symptom of pollution. The pollutant is sediment, dissolved oxygen, nutrients, etc. The Sierra Club will be submitting information for at least two waterbodies to be added to the list. Mr. Midkiff stated documentation on the River des Peres shows that the average fecal coliform was 78,440 colony-forming units per 100 milliliters; the standard is 200. Brush Creek in Kansas City had dissolved oxygen of 3 while the state standard is 5. Brush Creek has a violation rate of dissolved oxygen standards of 72%. Mr. Midkiff continued that only one of the 26

waterbodies of concern, Bear Creek, was listed for unknown. He stated if a stream is listed, the impairment should be listed.

For future lists, the EPA has informed the state that its beneficial use standard is not correct. Mr. Midkiff stated that according to the Federal Clean Water Act every waterbody is to be fishable and swimmable. All waterbodies in the state must meet aquatic habitat standards but very few streams are listed as whole body contact. EPA says that Missouri must list every waterbody as swimmable, and before the waterbodies can be removed from the list, a use attainability analysis must be completed. Mr. Midkiff noted that staff had previously stated that they could complete about 10 of these per year. He continued that no one has the data on most streams to show which streams meet the requirements. Mr. Midkiff noted the Sierra Club assumes this will be discussed for the 2006 303(d) List or before.

Robert Brundage, Missouri Ag Industries Council, stated in 1998 when the commission adopted the 303(d) List, there were three categories of streams. EPA then combined these categories into one list. The category listing sediment streams did not have enough data to be sure the streams were impaired by pollution. EPA issued a guidance document November 19, 2001 which DNR can follow. This document says the list can be broken into five categories. One of these categories is insufficient or no data and information to determine if any designated use is attained. Another category is impaired or threatened for one or more designated uses but does not require the development of a TMDL for several reasons, one of which is because the impairment is not caused by a pollutant. Mr. Brundage noted the last public notice on the 303(d) List did not follow this EPA guidance. He recommended the department and the commission follow this guidance and commented it would have been appropriate for the department to seek input from the public and the commission on whether or not to use this guidance. Mr. Brundage stated the deadline is not important but doing the list right by following the EPA guidance is. He continued that he has heard the guidance was not followed because EPA is developing a new watershed/TMDL/303(d) rule. If the list is developed using this integrated guidance document with five different categories, it will be obsolete when the new rule is promulgated. Mr. Brundage noted the same is true if the proposed list is adopted and suggested the EPA guidance document be followed in adopting the list.

Mr. Brundage stated there are 39 habitat loss streams listed. In 1998 these streams were listed as impaired by sediment. The cause of impairment has been changed to a broader category of habitat loss. Habitat loss is not defined in regulation and should be if a stream is going to be listed for impairment. There was very little data to list streams as impaired in 1998. Since that time there has been very little additional research to determine the scope of any sedimentation or habitat loss on these 39 stream segments. Mr. Brundage stated the department developed fact sheets for all the stream segments on what the cause of impairment was. For the 39 stream segments listed for habitat loss, there is one fact sheet which gives an idea of how much empirical data the department has to define the scope of habitat loss in these 39 streams. Another concern Mr. Brundage voiced is that there is virtually no way to delist a stream until some methods are developed to quantify the habitat loss. He posed the question of whether habitat loss is a pollutant or pollution. The June 7,

2002 public notice lists pollutant and habitat loss. Mr. Brundage noted he agrees with Mr. Midkiff that habitat loss is a symptom; it is not a pollutant but pollution.

Mr. Brundage noted north Missouri streams are listed on the 303(d) List for habitat loss while the Ozark streams where there has to be a tremendous amount of habitat loss with the large amounts of gravel in small channels of water are not listed. He questioned why channelization and other problems with north Missouri streams cause them to be listed when the Ozark streams that have had gravel accretion that has eliminated much habitat are not listed.

Mr. Brundage explained that while taking a deposition during some litigation, it was asked what is the real reason that the habitat streams are listed on the 303(d) List. He continued that department staff testified someone in management told DNR staff to add 40 sediment streams to the list. He read from the deposition as follows: Q: Did he tell you what particular 40 waters that he wanted added to the list? A: No, he did not. Q: He said I want 40 more waters on that list? A: That related to sediment and habitat loss, right. Q: Did he explain to you why he wanted 40 more waters on the list? A: I believe, I don't know if he explained at that time. I believe he said that, well I don't think he said anything at that time. Another question is followed by this answer. A: I think there was, he felt there was a need to add some of these waters on the list to make the list larger than the January list, that EPA might not approve this list that was as short as the one that we originally proposed issuing. Q: So there was some thought that EPA would want there to be a certain number of waters on the list in order to be satisfactory? A: Yes, and that other people might also. Q: And what other people? A: Particularly the people that we are hearing from that the list was too short was the Sierra Club and some other people in the public whose names I don't recall. Q: Do you know where the number 40 came from? A: No. Q: It was just a random number that might have a sufficient number to satisfy the comment that you had received or expected to get from EPA and others? A: I have no idea. Mr. Brundage stated there was some testimony that people believe that there are a lot more streams in the state that are impaired by habitat loss and that may be true.

Mr. Brundage asked that until there is some definition and a way to delist the streams, that these habitat streams not be listed just to make the list longer; but that it be done the right way. He noted there is a huge impact from being on the 303(d) List. The department will have to do a TMDL but until that is done, the regulatory impact on land use is unknown. Mr. Brundage asked the department and commission to seriously consider removing the 39 streams listed for habitat loss from the 303(d) List and to use the EPA guidance document where there are different categories. He noted without the use of categories, it will be difficult to move streams on the list.

Commissioner Greene asked what is required to delist a stream.

Mr. Ford responded the original set of guidelines being used say a stream can be delisted when compliance with water quality standards is met. Some of the EPA guidance says delisting can occur when a TMDL has been approved by EPA.

Commissioner Greene asked if there was no evidence to remove the streams that were in the separate category in the first list.

Mr. Ford replied this was partly due to an oversight on his part. The first category scheme is listed in the listed methodology document. The second scheme came with the new EPA guidance received just a few months ago. The first has a set of four categories and that was mistakenly left off this list that was put out for public notice. Mr. Ford stated these categories are still in the master database but were not public noticed.

Commissioner Minton asked how the public can comment on these categories if they weren't public noticed and how the commission can approve it without that opportunity being given to the public.

Mr. Ford responded it will be the commission's decision whether or not to approve the list.

Chairman Herrmann commented they cannot take action on it if the list that was public noticed did not include all the information.

Responding to Commissioner Greene's question, Mr. Ford said the original categories are still in the master database from which the public notice was generated.

Commissioner Minton asked if these categories are from the formulation of the old list or from a separate set of categories.

Mr. Ford replied it's mostly the list that was used for the old list. There are four categories defined in the listing methodology document that was public noticed as part of the public participation process.

Mr. Hull noted this is a proposed list that has been public noticed and the comments being voiced today are not totally unexpected and agreed this is a terribly important issue. He continued that EPA is expecting staff to follow through with this but there is no way to determine what the reaction might be if the list is not finalized at this time. The 303(d) List will have to be promulgated through a rulemaking in the future and there are individuals that have thoughts about this. Mr. Hull noted staff is looking for some direction from the commission. If a proposed final list is brought back to the commission for action, the comments received will be taken into account when formulating that list.

Ms. Shannon informed the commission she needs to verify if there are any grant conditions requiring the submittal of the 303(d) List by the deadline.

Commissioner Minton noted the Mississippi and Missouri Rivers were included at the last minute on the 1998 303(d) List which was a point of contention because they had not been public noticed. He asked if bringing a categorized list to the commission for approval at the next meeting will open the commission up to more lawsuits.

Ms. Shannon responded she is not aware of any legal requirement that the list be public noticed but staff has chosen to do so. Staff used the standard procedures used for other public notices as part of the public participation process. Ms. Shannon explained that staff could proceed with an abbreviated public notice in order to do a proposed final list in time for the August commission meeting.

Leslie Holloway, Missouri Farm Bureau, stated there is a significant difference between the old and new methodologies for developing the 303(d) List. During the hearing in October, Farm Bureau recommended that the new methodology be used in developing the list. Ms. Holloway again recommended use of the new methodology and submitted that EPA would be willing to work with the department if they are interested in going with the new methodology. Ms. Holloway noted the guidance document indicates that EPA expected that a few states might not be able to incorporate the new methodology into their process in time to have it used for the 2002 list but anticipated that most states would use the new methodology.

Ms. Holloway stated some of the significant differences in the methodologies include the categories that allow the states to distinguish between waterbodies that have been impacted by development over the years. The old methodology does not make this distinction, but in terms of making designation for designated uses and listing decisions, what waterbodies will require a TMDL where a TMDL could in fact bring a waterbody to whatever standard might be assigned to it, or those cases where it will be almost impossible to bring a waterbody to whatever standard might be ideal given the course of whatever development has taken place or naturally occurring substances.

Ms. Holloway noted comments previously made by Farm Bureau, and which will be made in written form again, pertained to habitat loss, mercury, nutrients and atrazine. She emphasized that the point that habitat loss is not a pollutant is an important point to make in terms of the listing and whether to use the old or new methodology. Another issue is whether or not waterbodies need to be designated for whole body contact will be addressed during the triennial review of the Water Quality Standards. Ms. Holloway stated to imply that EPA is expecting all those waterbodies to be listed for whole body contact may be erroneous given the fact that there is new methodology. The original direction on that issue came in September 2000 by a letter from EPA to the department. Ms. Holloway reported the policies have been reviewed and there is consideration given for realistic conditions that states may need to take into account. A study done by the National Research Council raised many of these issues at the national level. Mr. Holloway noted this study has been reviewed by many of the federal national organizations in trying to work through the process of nonpoint source pollution and of how TMDLs may or may not apply. The recommendation for the commission to direct the staff to approach EPA and look at using the new methodology was emphasized by Ms. Holloway. She noted landowners will see listing as a very intrusive regulatory step and Farm Bureau is very concerned about this.

Don Nikodim, Missouri Pork Association, encouraged the commission to look to the new review procedure from EPA as the methodology to list streams. He continued that this list should not be rushed. Mr. Nikodim noted concern with listing streams prior to October 1 with the new legislation requiring rulemaking to list the streams going into effect in August. He continued that his membership has a real concern about whole body contact.

Alex Stemme, Missouri Soybean Association, reported Missouri grows more than five million acres of soybeans making it one of the anchor agricultural industries in the state. He pointed out the Missouri and Mississippi Rivers are used for transportation and there is also a concern about the livestock industry since they are the soybean growers' number one customer. Soybean farmers have a concern that the 303(d) List is being promulgated in violation of Missouri law requiring it to be promulgated pursuant to rulemaking requirements of Chapter 536 which is being argued before the Missouri Supreme Court. If it is found the Clean Water Commission must promulgate the list by rulemaking, the 303(d) List will be invalid. Mr. Stemme noted the Soybean Association does believe it is invalid since rulemaking procedures such as public notice, publication in the *Missouri Register*, and fiscal notice have not been followed. He continued that recent legislation reasserts that rulemaking procedures must be followed in developing this list and going forward with the list before the effective date of this legislation will be contrary to the legislative intent. Mr. Stemme stated the continued inclusion of the Missouri and Mississippi Rivers for habitat loss as a pollutant is egregious as EPA has specifically stated that habitat loss is not a reason to have a body of water listed on the 303(d) List. He continued there is no evidence to justify including the Missouri and Mississippi Rivers on the list. Mr. Stemme noted it is curious that no other states have found that these waters in their entirety are impaired which will make Missouri responsible for whatever happens up river. He closed by saying that the 303(d) List is not the proper mechanism to use to clean up the Missouri and Mississippi Rivers.

Terry Spence noted he appreciates Commissioner Minton's comments on the public participation process. He said as a farmer he believes there are impaired waters in the state and commended the commission for working on the list. Mr. Spence asked that a cause be designated for those streams listed under habitat loss and that the commission proceed with development of the list.

Commissioner Greene spoke to the issue of rushing the list through before rulemaking procedures apply. She continued that DNR has put months worth of effort into holding public meetings in order to develop this list. Commissioner Greene noted there are problems with the list but it is not something that has been done hastily.

Chairman Herrmann noted since recent EPA guidance differs from what staff used, staff needs to clarify the ramifications of not submitting the list by the October 1 deadline but delaying until the list can be developed by using the most recent guidance.

Commissioner Minton asked if the last submittal of the 303(d) List occurred after the deadline.

Mr. Ford responded it was submitted five to six months late since it was brought to the commission three times before final approval was given.

Other

Permit Priorities

Mr. Midkiff noted concern about the Department of Natural Resources giving priority to permits not yet set to expire, while at the same time there are a number of permits that have already expired. He continued that a letter from the deputy director of the Water Protection and Soil Conservation Division to Maxine Lipeles states that it is time to move forward in the permit drafting process referring to a template permit under negotiation with Premium Standard Farms. Mr. Midkiff noted it is not understood how it is time to move forward with these permits when they are not set to expire for two years and asked that staff first address those permits that have already expired. He stated that they have no problem with permit efficiencies but there is a concern about a statement made at the last commission meeting that permit efficiencies were to make decisions and issue the permits. Mr. Midkiff stated the final result of the permit efficiencies is not always to issue the permit. He asked that the department have as its first priority those permits that have expired and not concentrate on permits that will expire two years from now until it is time to process those efficiently.

Mr. Hull responded that in reaching a decision quickly the decision can be to issue or deny a permit. He continued that another issue driving the Premium Standard Farms permit is the fact that it is under appeal. Mr. Hull clarified that staff working on this particular permit don't work on all the permits in the program.

Mr. Midkiff noted they understand this and the Sierra Club has been guaranteed a place in negotiations regarding this permit. The negotiations are proceeding on the conditions of the permit. Mr. Midkiff noted they do not consider simply being given the opportunity to review a permit which has previously been negotiated by staff with the appellant being part of the negotiations.

Mr. Spence noted this is a situation where they were left out of the loop. After several meetings with DNR staff and the Attorney General's Office, they were of the belief that all Premium Standard Farms permits had been completed without any public participation or input from the Sierra Club.

Land Application

Melody Torrey discussed instances of over application by Premium Standard Farms at the Whitetail facility.

Chairman Herrmann asked that Ms. Torrey make her concerns known to the Water Pollution Control Program so they can be evaluated.

Transfer of Funds

Commissioner Minton asked for an update on the transfer of funds between the Clean Water and Drinking Water SRF accounts.

Mr. Townley noted the transfer of approximately \$4.5 million from the Clean Water account to the Drinking Water account was predicated on EPA's withholding of payments. After discussions with EPA, staff was able to determine that EPA could not legally hold those payments. As a result of this, there was no need to transfer those monies and no formal action was taken because the issue is moot.

Chairman Herrmann asked if the accounting procedures EPA was questioning have been worked through.

Mr. Townley replied staff is working with EPA to hire a contractor to develop an entirely new automated system for the Drinking Water and Clean Water State Revolving Fund loans. He continued that the contractual documents are anticipated to be approved by EPA within about a week. Under a very aggressive schedule, the new system should be completed by early 2003. Mr. Townley noted this contractor has done several programs for other states but Missouri's is the first to look at the project side and the accounting and management in a bigger perspective than has previously been done.

Nationwide 404/401 Certification Process

Commissioner Minton asked for an update on where staff is at in working with the Corps of Engineers on nationwide permits.

Mr. Hull noted this might be possible at the August meeting.

Joint Commission Meeting

Mr. Hull reported he has been speaking with the director for the Soil and Water Conservation Commission regarding a joint meeting of the two commissions on September 5.

Chairman Herrmann suggested possibly holding the joint session the evening before the regular commission meeting.

Mr. Hull noted he will continue to work on scheduling this joint meeting.

LEGAL MATTERS

Dismissal of Appeal 333 Willamette Industries, Inc. Mill Spring Wood Recovery Facility

Deborah Neff, Commission Counsel, reported that Willamette Industries has voluntarily dismissed Appeal 333 pursuant to a Settlement Agreement. She requested the commission vote to dismiss the appeal.

David Shorr, representing Willamette Industries, Inc. stated voluntary dismissal of this appeal is part of the Settlement Agreement with the state. A permit was issued with the understanding that one item in the new permit would be appealed. This has been done under Appeal 372 along with agreeing to a joint stay.

Responding to Commissioner Minton's question, Mr. Shorr responded two outfalls were included in the new permit and debate is ongoing on whether outfall 002 is legally appropriate.

Commissioner Greene moved to **grant Willamette's request to dismiss Appeal 333 Willamette Industries, Inc. Mill Spring Wood Recovery Facility**; seconded by Commissioner Minton and unanimously passed.

Request for Stay Appeal 372 Willamette Industries, Inc. Mill Spring Wood Recovery Facility

Ms. Neff reported the parties agreed some time ago to a stay regarding outfall 002 until the appeal is concluded. The hearing officer's recommendation is to approve the request for stay. Ms. Neff recommended the commission enter the order approving the stay as agreed to by the parties.

Commissioner Greene moved to **approve the Request for Stay regarding Appeal 372 Willamette Industries, Inc. Mill Spring Wood Recovery Facility**; seconded by Commissioner Minton and unanimously passed.

Dismissal of Appeal 347 Continental Coal, Inc. Mary Jane Mine

Ms. Neff explained Continental Coal has voluntarily dismissed this appeal and requested the commission grant the requested dismissal.

Commissioner Greene moved to **dismiss Appeal 347 Continental Coal, Inc. Mary Jane Mine as requested by the appellant**; seconded by Commissioner Kelly and unanimously passed.

Dismissal of Appeal 367 The Doe Run Resources Corporation Herculaneum Smelter

Ms. Neff reported a voluntary dismissal was filed by the appellant due to the parties entering into a Settlement Agreement. She requested dismissal of the appeal as requested.

Commissioner Greene moved to **dismiss Appeal 367 The Doe Run Resources Corporation Herculaneum Smelter as requested by the appellant**; seconded by Commissioner Kelly and unanimously passed.

There being no further business to come before the commission, Chairman Herrmann adjourned the meeting at approximately 12:15 p.m. on June 26, 2002.

Respectfully submitted,

Jim Hull
Director of Staff